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No. 06-1195

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. DENIAL OF REHEARING WILL PRODUCE UNREASONABLE DELAY AND THWART THE FUNDAMENTAL PURPOSE OF HABEAS CORPUS 2

II. THE GOVERNMENT MISREPRESENTS SEVERAL KEY ISSUES REGARDING THE NATURE OF DTA PROCEEDINGS, AS WELL AS THE IMPLICATIONS OF THE COURT'S DENIAL OF CERTIORARI IN THIS CASE 4

III. DEFERRING CONSIDERATION OF THE PETITION WILL NOT CREATE "CONFUSION" 6

IV. THE GOVERNMENT ACKNOWLEDGES THAT COURTS HAVE HISTORICALLY DEFERRED CONSIDERATION OF PETITIONS FOR REHEARING IN IMPORTANT AND APPROPRIATE CASES 7

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Page(s)

Boumediene v. *Bush*, 127 S. Ct. 1478 (2007) 2, 3, 6

Carafas v. *LaVallee*, 391 U.S. 234 (1968) 3

STATUTES

28 U.S.C. § 2241 3

Petitioners respectfully submit this Reply Brief in support of their Petition for Rehearing.

ARGUMENT

The government has never disputed that the issues presented by the petition for certiorari in this case—especially the constitutional issues presented by the court of appeals' ruling that the Detainee Treatment Act (DTA) and the Military Commissions Act (MCA), taken together, have completely foreclosed Petitioners' access to the Great Writ of Habeas Corpus—are extraordinarily important and would warrant this Court's review in an appropriate case. Nor does the government dispute that those issues are squarely presented in this case and would be ripe for this Court's review if the D.C. Circuit, after reviewing Petitioners' Combatant Status Review Tribunal (CSRT) proceedings pursuant to petitions under the DTA, were to conclude that the DTA provided Petitioners with significantly less protection than the writ of habeas corpus. Nonetheless, the government suggests that Petitioners should exhaust the DTA procedures and then, if those procedures prove inadequate, file *yet another* petition for habeas corpus in the district court—ensuring that the pressing constitutional issues in this case will take years to resolve.

Meanwhile, Petitioners remain imprisoned at Guantanamo for over five years, without charges or fair process and with no imminent hope of adequate review, let alone release. While Petitioners are mindful of the Court's denial of certiorari in this case, they respectfully submit that this Court can at least cabin the delay and prejudice by retaining jurisdiction over this petition for rehearing until the appropriate time for action on that petition. Petitioners do not ask the Court to grant the petition *now*; they merely ask the Court to hold open the possibility that, if the D.C. Circuit were to construe the DTA in a manner that does not provide an adequate substitute for habeas corpus, the Court could review the resulting constitutional issues in this case—a habeas corpus case that has already been filed and reviewed in the lower courts—rather than (a) confining its review to the DTA case, in which the constitutional issues may not be squarely presented, or (b) requiring Petitioners to file yet another habeas corpus petition and take yet another futile trip through the district court and the court of appeals.

I. DENIAL OF REHEARING WILL PRODUCE UNREASONABLE DELAY AND THWART THE FUNDAMENTAL PURPOSE OF HABEAS CORPUS

The government makes the startling suggestion that a demonstrably inadequate DTA process would be irrelevant to the merits of this petition for rehearing because "litigants do not have the option of bypassing proceedings in the lower courts simply because they believe they will not get what they want." Reh'g Opp. 6. Petitioners are not "bypassing" anything; they have filed DTA petitions for expeditious review. Moreover, the government's assertion ignores the principle that habeas corpus "does not require the exhaustion of inadequate remedies." 127 S. Ct. 1478, 1478 (statement of Stevens & Kennedy, JJ., respecting denial of certiorari) (internal quotation marks omitted), as well as the warning that "unreasonabl[e] delay[]" in the DTA proceedings would prompt "alternative means" of reviewing Petitioners' detention. *id.*

The government's vision for the future of Petitioners' challenges to their confinement is not resolution, but delay and endless cycles of review and remand. Notably, the government does *not* concede that a DTA case could be a proper vehicle for reviewing the threshold issue presented by this petition: whether the Military Commissions Act constitutionally deprives Guantanamo detainees of habeas jurisdiction to challenge the lawfulness of their confinement. Indeed, the government's suggestion that Petitioners would have to re-file a new habeas petition following DTA proceedings (Reh'g Opp. 9) demonstrates its view that a DTA case is *not* a proper vehicle for the vital issues presented in this case.

In the event that the DTA is held not to allow Petitioners to present their habeas claims and evidence in full—and the government has consistently and strenuously argued that it does not—the government appears to contemplate the following steps: Petitioners would have to (1) litigate their DTA petitions in the court of appeals to conclusion (despite the inadequacy and likely futility of DTA review); (2) seek certiorari review of the court of appeals' interpretation and application of the DTA; (3) file a new habeas petition in district court reasserting that the MCA's suspension of habeas is unconstitutional, in part because the DTA is an inadequate substitute for habeas corpus (one of the principal issues already presented in the certiorari briefing in this case); (4) brief and

litigate that case in the district court; (5) brief and litigate the inevitable appeal of the district court's ruling regarding the availability of habeas review; (6) return to this Court to brief and litigate the questions currently presented by this petition; and finally, (7) return to the district court to begin addressing the merits of Petitioners' habeas petitions. *See* Reh'g Opp. 9. The procedure could very easily be even further complicated if—as the government suggests (*id.* at 7-8)—the court of appeals were to "remand" Petitioners to a new CSRT process, which the government continues to contend is the sole remedy available under the DTA.

There could scarcely be a process better calculated to create unreasonable delay and fatally "compromise[]" the "office and purposes of the writ of habeas corpus." 127 S. Ct. at 1478 (statement of Stevens & Kennedy, JJ., respecting denial of certiorari) (internal quotation marks omitted), which exists in Anglo-American jurisprudence as "an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person." *Carafas* v. *LaVallee*, 391 U.S. 234, 238 (1968).[1] Petitioners' first trip through judicial review (of the four that are contemplated under the government's vision) has already taken almost three years, during which time their unjustified imprisonment continues unabated. The delay and severe prejudice to Petitioners envisioned by the government could be at least partially mitigated if this Court were to retain jurisdiction over the petition for rehearing and leave open the possibility that Petitioners would not be forced to re-run the procedural gauntlet in the event the court of appeals accepts the government's exceedingly narrow interpretation of the scope of review available under the DTA.

Although Justices Stevens and Kennedy suggested that this Court could review Petitioners' claims through "alternative means," namely an original writ of habeas corpus pursuant to 28 U.S.C. § 2241, 127 S. Ct. at 1478, that path is by no means clear.

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[1] The government's suggestion that DTA review and new habeas proceedings could be meaningfully "expedited" (Reh'g Opp. 9) is unconvincing in light of the experienced realities of these cases. Despite the fact that the court of appeals also "expedited" the present cases—which were equally "important[]" and equally subject to a "need for prompt guidance" (*id.* at 5)—the case languished in the court of appeals for two years.

As noted in the Petition for Rehearing, the Court has not issued an original writ in over eighty years. Pet. for Reh'g 7-8. More importantly, the government moved just last month to dismiss a petition for an original writ of habeas corpus on the ground that this Court lacks jurisdiction to consider such a petition under the MCA. Mot. to Dismiss 6, *In re Ali*, No. 06-1194 (U.S. May 16, 2007). Thus, as we speak, the government is vigorously seeking to foreclose the very procedural alternative that Justices Stevens and Kennedy identified as the safety valve justifying the Court's denial of certiorari pending Petitioners' DTA proceedings.

II. THE GOVERNMENT MISREPRESENTS SEVERAL KEY ISSUES REGARDING THE NATURE OF DTA PROCEEDINGS, AS WELL AS THE IMPLICATIONS OF THE COURT'S DENIAL OF CERTIORARI IN THIS CASE

The government suggests that its "proposed procedures in no way prevent petitioners from being released." Reh'g Opp. 7.[2] To be sure, the government could release Petitioners at any time without prompting from a court. But the purpose of the Great Writ is to enable *judicial* review of the lawfulness of executive detention, including a *judicial* order terminating unlawful confinement (which may result in release, or, alternatively, the institution of lawful proceedings against the detainee). And the government's argument that "a remand [for a new CSRT] would be the appropriate remedy" for a successful DTA petition (Reh'g Opp. 7) confirms its position that DTA review can never give the *judicial* remedy of release available on habeas review. *See also* Pet. App. 40a-41a. Still more worrisome, the government has in the past continued to detain even those men who were *exonerated* by the original CSRT process, contending that they had no judicial recourse to challenge their detention. *See* Opp. to Mot. to Expedite Appeal 2-

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[2] While obfuscating the question whether DTA remedies may include an order of release, the government offers no response to Petitioners' demonstration that the evidentiary procedures advocated by the government would preclude meaningful factual review of their detention in the first place. Pet. for Reh'g 3-4. Instead, the government simply observes that it is "uncertain" whether the court of appeals will adopt the DTA procedures that the government has so strenuously advocated below. Reh'g Opp. 6; *see also* Resp. Br. Addressing Pending Prelim. Mots. 49-68, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Apr. 9, 2007).

3, *Qassim* v. *Bush*, No. 05-5477 (D.C. Cir. Jan. 18, 2006) (arguing that persons exonerated by CSRTs may nonetheless "remain detained" as "former enemy combatants" at the Executive's discretion). There can be no assurance, therefore, that even if Petitioners were to prevail in their challenges to their CSRT proceedings under the DTA, the result would be their release from unlawful confinement.

The government also attempts to obscure the fact that the destruction of classified documents upon termination of the habeas case will inflict irreparable harm on Petitioners. *See* Protective Order & Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba 10-11, *In re Guantanamo Detainee Cases*, No. 02-0299 (D.D.C. Nov. 5, 2004). Even the government's carefully phrased assurances that it will preserve "records of material filed in court" and "records generated during the CSRT process" (Reh'g Opp. 7 n.4) merely indicate its present intent with respect to a limited category of materials prepared by counsel in these cases, and lack any mechanism to bind or limit the government. The government does not deny that termination of Petitioners' habeas case would lead to the destruction of "[a]ll documents containing classified information prepared, possessed or maintained by, or provided to, petitioners' counsel." Pet. for Reh'g 9-10 (quoting protective order). The government's position would vest it with unreviewable discretion to destroy counsel's classified work product, including privileged communications, which reside in the custody of the Court Security Officer.[5]

Finally, the government's contention that it will adequately safeguard Petitioners' right to counsel (Reh'g Opp. 7) is contradicted by its actions. The government already has aggressively used this Court's denial of certiorari to interfere with communications between Petitioners and their counsel. Despite the Protective

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[5] The government all but admitted this in its June 8, 2007 letter to the court of appeals in *Bismullah* v. *Gates*, No. 06-1197 (D.C. Cir.), which stated that the government's destruction of "materials reflecting *communications between detainee counsel and the detainee clients or other detainee counsel materials*" would be "warranted" because, it was contended, "the government cannot preserve such files after the conclusion of a case." Letter from August E. Flentje to Mark J. Langer, Clerk, U.S. Court of Appeals for the District of Columbia Circuit 2 (June 8, 2007) (emphasis added).

Order entered in this case, the government did not deliver privileged mail and refused to allow Petitioners' counsel to visit their clients until each Petitioner filed an additional action under the DTA and stipulated to entry in the DTA case of a new, more restrictive protective order. Among other things, the new protective order allows the government to monitor attorney-client communications, review attorney work product, and limit counsel's access to classified information at the government's unilateral discretion. *See, e.g.*, Stipulation to Immediate Interim Entry of Protective Order, Ex. A, at 9-13, 32-33, *Boudella* v. *Gates*, No. 07-1167 (D.C. Cir. May 30, 2007). By retaining jurisdiction over this case, this Court can ensure that Petitioners (and other Guantanamo detainees) remain able to communicate with counsel fully, freely, and in confidence, and will eliminate the ability of the government unilaterally to destroy work product generated in habeas cases and equally pertinent in any DTA proceeding.

III. Deferring Consideration Of The Petition Will Not Create "Confusion"

In contrast to the serious prejudice that Petitioners risk if the present case is ended, the government does not identify any meaningful harm it would suffer if the Court defers consideration of the Petition for Rehearing. The government suggests that deferring consideration will engender "confusion" in the lower courts (Reh'g Opp. 9-10) or "interfere with the [DTA] litigation now underway in the D.C. Circuit" (*id.* at 2). Deferring consideration of this petition might dismay the government, but it would not confuse anyone. The DTA proceedings would continue apace—as contemplated by Petitioners (Pet. for Reh'g 1-2), the government (Reh'g Opp. 2), and Justices Stevens and Kennedy (127 S. Ct. at 1478). And the district court has proven amply capable of coordinating the habeas cases during the pendency of this case in the court of appeals and in this Court. The government offers no reason to believe that they will not continue to do so appropriately pending resolution of the DTA proceedings and the petition for rehearing.

The government's prediction that deferring consideration will "put[] this Court in the role of special master over the detainee litigation" is misplaced. Reh'g Opp. 9. Petitioners have asked this Court to review important questions of constitutional law applicable across the board to numerous Guantanamo detainees, not to

develop facts or to address case-management issues arising in specific cases. While Petitioners' habeas claims will certainly require factual development in the district court if they are permitted to go forward, the questions before this Court in this case are only, and have only ever been, questions of law.

IV. The Government Acknowledges That Courts Have Historically Deferred Consideration Of Petitions For Rehearing In Important And Appropriate Cases

The government nowhere denies that "the Court has not hesitated to postpone reconsideration of orders denying certiorari where deferral advances the interests of justice and judicial efficiency." Pet. for Reh'g 5 (citing cases), nor does it refute the longstanding judicial practice of deferring petitions for rehearing during the pendency of potentially decisive proceedings before another court. *id.* at 6.[1] Instead, the government simply reiterates that the present request is unusual. Reh'g Opp. 1-2. Petitioners readily acknowledge that theirs is an unusual request, but this is an unusual case. The issues in this case are extraordinarily important, and the need for this Court's resolution of those issues in an appropriate vehicle is evident. Petitioners therefore respectfully submit that the Court should review those issues in this case, at the appropriate time after proceedings in the D.C. Circuit on the scope of the DTA.

CONCLUSION

The Court should defer consideration of this petition for rehearing pending resolution of DTA proceedings in the court of appeals, at which point the petition for rehearing should be granted.

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[1] The government's repeated references to the "specula[tive]" nature of Petitioners' request are thus difficult to understand. Reh'g Opp. 2, 5, 7. In each case where resolution of a petition for rehearing was deferred, the grounds for ultimate rehearing were by definition uncertain at the time that deferral was granted.

Respectfully submitted.

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